

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Revocation of the
Child Care Center License of New
Generation Child Development Center

**FINDINGS OF FACT, CONCLUSIONS,
AND ORDER**

This matter comes before Chief Administrative Law Judge (ALJ) Raymond R. Krause following a hearing pursuant to New Generation Child Development Center's (Licensee or NGCDC) appeal from a March 13, 2008 Order of License Revocation. The hearing in this matter was held on April 1, 2009 at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota. Following the hearing, on April 16, 2009, Licensee filed its post-hearing Memorandum of Law. The Department of Human Services Licensing Division (Department) filed a Reply Memorandum on May 29, 2009. The record in this matter closed on May 29, 2009.

Steven H. Alpert, Assistant Attorney General, appeared on behalf of the Department. Samuel A. McIntosh, Sr., appeared on behalf of Licensee.

STATEMENT OF ISSUE

Did the Department demonstrate reasonable cause for finding that the license holder failed to fully comply with applicable laws or rules, or that a controlling individual has a disqualification which has not been set aside? The ALJ finds that the Department did not establish reasonable cause to revoke NGCDC's license.

Based on the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On or about August 30, 2006, NGCDC applied for a Child Care Program license pursuant to Minnesota Rules, Parts 9503.0005 through 9503.0170, also known as Rule 3, which governs day care center licenses.¹

2. On the Child Care Program application, NGCDC is listed as the "Name of Person(s), organization, corporation that license is issued to."²

¹ Department's Hearing Ex. (Ex.) 2; see Minn. R. 9503.0005, subp. 3.

² Ex. 2.

3. New Generation Child Development Center, Inc. was incorporated in Minnesota in July, 2002.³ At the time the corporation was formed, Geneve Marshall and Emmelyn Johnson each received 500 shares of common stocks in the corporation in consideration for cash and professional services each provided to the corporation.⁴

4. Geneve Marshall, president, and Emmelyn Johnson, director, are listed as the controlling individuals on the application, and Geneve Marshall is specified as the person to whom sensitive information should be sent.⁵

5. On the Initial Application Information form, which was signed by Geneve Marshall on August 24, 2006, the name of license holder is specified as "New Generation Child Development Center" with Geneve Marshall listed as the controlling individual.⁶

6. The Department's database lists the license holder for Licensee as New Generation Child Development Center.⁷

7. The Department issued day care center licenses in 2007, 2008 and 2009 to New Generation Child Development Center.⁸

8. On June 20, 2007, Geneve Marshall and Emmelyn Johnson each transferred 150 shares of common stocks in New Generation Child Development Center to Henrika Marshall.⁹

9. On July 2, 2007, Henrika Marshall was appointed Licensee's Managing Director.¹⁰

10. Geneve Marshall and Emmelyn Johnson jointly held a family child care license which was first issued to them in February, 2005. This license was distinct from any licenses granted to NGCDC. The Department revoked Ms. Marshall and Ms. Johnson's family child care license in April, 2007.¹¹ Following an appeal to the Commissioner of Human Services by Ms. Marshall and Ms. Johnson, the revocation became final on January 3, 2008.¹²

11. Other than the common involvement of Ms. Marshall and Ms. Johnson, there was no evidence to show that their home day care program was in any way connected with the Licensee, NGCDC.

³ Licensee's Hearing Ex. (Ex.) A.

⁴ Ex. B.

⁵ *Id.*

⁶ Ex. 3.

⁷ Ex. 5

⁸ Ex. E.

⁹ Ex. C.

¹⁰ Ex. G; testimony of Henrika Marshall.

¹¹ See *In the Matter of the Revocation of the Family Child Care License of Geneve Marshall and Emmelyn Johnson*, Findings of Fact, Conclusions and Recommendation, OAH Docket No. 8-1800-18084-2 (November 2, 2007).

¹² Ex. 1.

12. In a letter dated March 13, 2008, the Department revoked Licensee's license to operate a child care center. In the Order of License Revocation, the Department stated that the reason for the revocation was because Geneve Marshall and Emmelyn Johnson had had their home day care license revoked and they are controlling individuals of Licensee. The letter cited Minn. Stat. §§ 245A.04, subd. 7(e) and 245A.08, subd. 5a(a) as authority for the revocation.¹³

13. The revocation letter served on NGCDC cited no licensing violations by NGCDC as the basis for the revocation. The letter only cited the revocation of the license previously held by Ms. Marshall and Ms. Johnson.

14. Licensee timely appealed the revocation of its license on March 20, 2008.¹⁴

15. Licensee's 2008 license expired on December 31, 2008. It was issued a temporary provisional license effective January 1, 2009 so it could continue to operate pending the outcome of this appeal.¹⁵

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Human Services have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50 and 245A.08.

2. The Notice of Hearing is proper in all respects and the Department has complied with all procedural requirements of law and rule.

3. The Licensee or License Holder in this matter is the New Generation Child Development Center, Inc.

4. At all times relevant to these proceedings, Licensee was licensed as a child care center.

5. Minn. Stat. § 245A.04 governs application procedures for human services licenses. Subdivision 7(e) of that section prohibits the Commissioner of Human Services (Commissioner) from issuing a license "if the applicant, license holder, or controlling individual has . . . had a license revoked within the past five years."

6. Minn. R. 9503.0005, subp. 3 defines "applicant" for purposes of the day care center licensing rules as a person, corporation, partnership, voluntary association, or other organization that has applied for licensure under Minnesota Statutes, chapter 245A, and parts 9503.0005 to 9503.0170. The term includes license holders that have applied for a new license to continue operating a child care program after the expiration date of their current license.

¹³ Ex. 8.

¹⁴ Ex. 9

¹⁵ Ex. E. See Minn. Stat. § 245A.07, subd. 1 (2008)

7. Pursuant to Minn. Stat. §. 245A.02, subd. 5a, a “controlling individual” includes an owner who is “an individual who has direct or indirect ownership in a corporation . . . or other business association issued a license under this chapter.” A business entity may be a controlling individual.

8. Geneve Marshall, Emmelyn Johnson, Henrika Marshall, and New Generation Child Development Inc. are all controlling individuals of New Generation Child Development Center.

9. Minn. Stat. § 245A.08 governs hearing procedures when the Commissioner has denied a license application or taken action against a current license. Subdivision 5a(a) of that section states “[a] license holder and each controlling individual of a license holder whose license has been revoked because of noncompliance with applicable law or rule must not be granted a license for five years following the revocation.”

10. Minn. Stat. § 245A.07 permits the Commissioner to sanction a license holder for failure to comply with applicable law or rule. Subdivision 3 of this section permits the Commissioner to “suspend or revoke a license, or impose a fine if a license holder fails to comply fully with applicable laws or rule” or “if a license holder, [or] a controlling individual . . . has a disqualification which has not been set aside. . . .”

11. Because the Department failed to allege that the license holder violated any applicable law or rule and neither the license holder nor any controlling individual has a disqualification, the Department failed to show that there was a basis to revoke NGCDC’s day care center license.

12. When a license holder continues to operate a program during an appeal and the existing license expires, Minn. Stat. § 245A.07, subd. 1(b) requires the Commissioner to issue a temporary provisional license pending the outcome of the appeal.

13. Minn. Stat. § 245A.07, subd. 1(b) requires that, when the Commissioner has issued a temporary provisional license pending the final outcome of an appeal, “[i]f the license holder prevails on the appeal and the effective period of the previous license has expired, a new license shall be issued to the license holder upon payment of any fee required under section 245A.10.” Both the effective date and the expiration date of the new license shall be what they would have been “had no license sanction been initiated.”

14. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

15. The Memorandum that follows explains the reasons for these Conclusions, and the Administrative Law Judge therefore incorporates that Memorandum into these Conclusions.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the Commissioner REVERSE the decision to revoke the day care center license of New Generation Child Development Center and issue a license to New Generation Child Development Center as required by Minn. Stat. § 245A.07, subd. 1(b).

Dated: June 23rd, 2009.

/s/ Raymond R. Krause

RAYMOND R. KRAUSE

Chief Administrative Law Judge

Reported: Digitally Recorded (No Transcript Prepared).

NOTICE

This report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Human Services will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Cal Ludeman, Commissioner, Minnesota Department of Human Services, P.O. Box, 64998, St. Paul MN 55164-0998, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline

for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The Department is essentially making two related arguments. First, Ms. Johnson and Ms. Marshall are really the license holders, not NGCDC. The license is, therefore, subject to revocation because, as controlling individuals and license holders, they are ineligible due to their previous individual license revocations. Second, even if NGCDC is the license holder, it failed to comply with applicable law by having controlling individuals that had other licenses revoked.

The Notice of Revocation in this matter cites only provisions relating to *granting* a license to a license applicant. The action was not brought under the statute relating to sanctions on *existing* licenses. This does not appear to be an oversight on the part of the Department because the standard for refusing to grant a license is lower than the standard for revoking a license. In this case, the Department has established facts that indicate that granting a new license may not be appropriate. That, however, is not the action before the ALJ. The Department has not established facts that meet the standard for revocation of an existing license.

Minn. Stat. § 245A.07 spells out the kinds of sanctions to existing licenses available to the Department, and the circumstances under which various sanctions can be imposed. This provision clearly distinguishes between situations where a *license holder's* license can be revoked (the "license holder fails to comply fully with applicable laws or rules") and the circumstances where a *controlling individual's* behavior can lead to revocation of a license ("if a . . . controlling individual . . . has a disqualification . . ."). There is no claim that any of Licensee's controlling individuals have a disqualification so the only relevant inquiry is to whether the license holder has failed to comply with applicable law.

The Department argues that Ms. Marshall and Ms. Johnson are the license holders, and thus held to the higher standards of license holders in § 245A.07. The Department's only support for the proposition that these two individuals are the license holders is that Minn. Stat. § 245A.02, subd. 9 includes in the definition of "license holder," a requirement that the license holder also be a controlling individual. Indeed, both individuals are "controlling individuals" of NGCDC. That does not, however, automatically make them the license holders. Both the definitions of "license holder" and of "controlling individual" include corporations.¹⁶ New Generation Child Development, Inc., therefore, also qualifies as a controlling individual for purposes of the definition of a

¹⁶ See Minn. Stat. § 245A.02, subd. 5a and 9.

license holder. In other words, a license holder must be a controlling individual but not every controlling individual is a license holder. NGCDC, as a controlling individual, can be, and is also the license holder. Ms. Johnson and Ms. Marshall are controlling individuals but not license holders.

While Ms. Marshall apparently applied for the license on behalf of NGCDC, the documents clearly show that the intended Licensee was NGCDC. The Department's own documents consistently recognize NGCDC as the holder of the child care center license.

The Department also implies that, by permitting two controlling individuals to continue in their positions following revocation of their home day care license, the Licensee has failed to comply with applicable laws or rules. This argument might be persuasive were it not for the language in § 245A.07 explicitly distinguishing between the qualifications for license holders and those for controlling individuals.

Under Minn. Stat. §§ 245A.04, subd. 7 (e) and 245A.08, subd. 5a (a), when any of a license applicant's controlling individuals has had a human services license revoked, the Commissioner cannot *issue* a license to that applicant. The legislature could have written a similar provision into section 245A.07, regarding existing licenses, but it did not. This is not simply a matter of different headings on interchangeable provisions, as the Department argues. Application for a license and revocation of a license are different procedures with different requirements and different rights attaching to the license-holders.¹⁷ It is not illogical that the legislature would establish different standards for applicants and existing license holders.

The legislature made the past conduct of controlling individuals (short of conduct that resulting in a disqualification) a potential bar to granting a license. It could easily have done so in §245A.07, which discusses sanctions on an existing license. The statute, however, set a different standard (disqualification) for sanctions of an existing license. This fact weighs heavily against a finding that the license revocation of controlling individuals should be included in a general catch-all of failure by the license holder to comply with applicable laws and rules.

The Department cites § 645.17 (1) and (2) in arguing that the statutes governing license applicants and license holders should be interpreted to establish the same standards to avoid an absurd result. But § 645.16 limits application of § 645.17 to circumstance where the words of a law are ambiguous.¹⁸ The words of the applicable statutes in this case are not ambiguous.

¹⁷ For example, when the Department denies an applicant a license, the applicant bears the burden of proof on appeal of the Department's decision. When the Department sanctions an existing license, the Department bears the initial burden of proof. Minn. Stat. § 245A.08, sub. 3.

¹⁸ See Minn. Stat. § 645A. 16 ([“W]here words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.”)

Finally, the Department argues that, even if Licensee's license could not be revoked, the Commissioner may not issue a new license at the conclusion of this case. The language of § 245A.07, subd. 1 (b) does not support this argument. The Department issued Licensee a temporary provisional license during the pendency of this appeal. If the Commissioner issues an order reversing the revocation consistent with this recommendation, Licensee will have prevailed on appeal. Minn. Stat. § 245A.07, subd. 1 (b) requires the Department to issue a license if the Licensee "prevails on appeal . . . upon payment of any fee required under section 245A.10." The revocation records of the controlling individuals can only be considered at the time of re-licensure for 2010.

In summary, having controlling individuals who were subject to a previous revocation may be cause for denial of a license application but that alone is insufficient cause, under the proper statutory provisions, for revoking an existing license.

R.R.K.